

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
CONNECT AMERICA FUND) **WC Docket No. 10-90**
)

**REPLY COMMENTS OF THE
INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE**

The Independent Telephone & Telecommunications Alliance (“ITTA”) hereby submits its reply comments in response to the December 27, 2012 *Public Notice* issued by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding.¹ The *Public Notice* seeks input on proposed procedures to provide an opportunity for parties to challenge whether census blocks that are identified as eligible to receive Connect America Fund (“CAF”) Phase II support are in fact unserved by an unsubsidized competitor. It also seeks comment on procedures relating to the election of price cap carriers to accept CAF Phase II support in exchange for making a statewide commitment.²

I. INTRODUCTION AND SUMMARY

As explained below, the CAF Phase II challenge process proposed in the *Public Notice* suffers from a number of flaws, including its reliance on inaccurate and unverified National Broadband Map (“NBM”) data as the foundation for determining whether a census block is served by an unsubsidized competitor, its use of the 3 Mbps downstream/768 kbps upstream standard as a proxy for the availability of broadband service at 4/1 Mbps, and the lack of defined standards for speed, latency, and capacity for purposes of evaluating whether unsubsidized competition exists.

¹*Wireline Competition Bureau Seeks Comment on Procedures Relating to Areas Eligible for Funding and Election to Make a Statewide Commitment in Phase II of the Connect America Fund*, WC Docket No. 10-90, DA 12-2075 (rel. Dec. 27, 2012) (“*Public Notice*”).

² *Id.* at ¶ 3.

The subsequent *Service Obligations PN* issued by the Commission proposes modifications that could help address some of those flaws by requiring certain providers that seek to be deemed unsubsidized competitors to prove that they offer broadband service meeting the necessary criteria in the relevant census blocks, establishing 6 Mbps downstream/1.5 Mbps upstream as the proxy for availability of 4/1 Mbps broadband service to ensure that support is not excluded from areas that currently are served at less than 4/1 Mbps speeds, and recognizing the necessity of establishing broadband speed, latency, usage, and voice capability standards as a condition precedent to identifying the census blocks that are eligible for CAF Phase II funding.³

ITTA believes that the Commission should build on its proposals in the *Service Obligations PN* and require all would-be unsubsidized competitors to make an affirmative showing that they provide both voice and broadband service meeting applicable standards before a census block is deemed ineligible for CAF Phase II funding, as it is almost impossible for current support recipients to prove a negative (*i.e.*, the absence of unsubsidized competition). Once the Commission establishes the relevant eligibility criteria, any provider would be free to file a petition to demonstrate by clear and convincing evidence that it meets those requirements in order to be designated as an unsubsidized competitor, and would serve the CAF recipient whose support would be affected by such a determination to provide an opportunity for rebuttal.

The process would be subject to reasonable timelines to properly balance the need for a timely decision with the need for those involved to thoroughly consider the evidence. Should the petitioner and opponent both submit credible evidence regarding the availability of broadband service in a census block, the information in the NBM would not serve as the default with respect to determining the presence of unsubsidized competition. Rather, the relevant state commission, which

³ See *Wireline Competition Bureau Seeks Further Comment on Issues Regarding Service Obligations For Connect America Phase II and Determining Who Is an Unsubsidized Competitor*, Public Notice, DA 13-284 (rel. Feb 26, 2013) (“*Service Obligations PN*”).

would be in the best position to weigh the relative merits of the evidence and render a fair decision, would make that determination.

Once the final list of eligible census blocks and support amounts for CAF Phase II is made available, the process for carriers to make a statewide election must be reasonable. They should have at least 120 days in which to make a decision as to whether to accept the support they have been allocated. The Commission also should not require the submission of geocoded latitude or longitude data or preliminary buildout plans identifying the locations to be served within a census block or wire center in connection with statewide elections, as CAF Phase II support is not location dependent and the burden associated with unnecessary filing requirements could act as a deterrent to carriers' acceptance of CAF Phase II support.

II. THE PROPOSED CHALLENGE PROCESS IS RIFE WITH PROBLEMS AND SHOULD BE REJECTED

The *Public Notice* assumes that the NBM will be used to create a list of unserved census blocks with costs between the extremely high-cost threshold and the funding threshold shown in the Connect America Cost Model and that interested parties would have an opportunity to challenge that list.⁴ Challengers would be required to list specific census blocks that are inaccurately classified as served or unserved by an unsubsidized competitor and provide supporting evidence that those census blocks are inaccurately reported on the NBM.⁵ Challenges could be based on any or all of the Commission's broadband performance metrics – speed, latency, and/or capacity.⁶ This proposed process is very similar to the process the Wireline Competition Bureau (“WCB” or “Bureau”) previously proposed for the CAF Phase I Incremental Support program⁷ and, unfortunately, shares a number of the same critical and well-documented flaws. On the other hand, the *Service Obligations*

⁴ *Public Notice* at ¶ 10.

⁵ *Id.* at ¶ 11.

⁶ *Id.*

⁷ See *Connect America Fund*, Further Notice of Proposed Rulemaking, WC Docket No. 10-90, FCC 12-138, ¶¶ 13-16 (rel. Nov. 19, 2012) (“*FNPRM*”).

PN released by the Bureau on February 26, 2013 proposes several modifications to the process that could help address some of those flaws.

A. Reliance on the National Broadband Map is Unjustified.

First, and most fundamentally, the foundation upon which the process rests – *i.e.*, the NBM – is irredeemably flawed. As numerous parties have explained in comments in this and other dockets, the NBM does not accurately identify the availability of broadband service as defined by the Commission.⁸ Moreover, self-reporting by wireless Internet service providers (“WISPs”) and cable companies appears to have led to the significant overstatement of service availability in many areas.⁹ For example, although the NBM represents that large segments of rural America are served by a WISP with 3 Mbps downstream/768 kbps upstream service, such representations are not infrequently based on WISPs’ general marketing claims and have not been independently verified. As has been widely reported, there are a number of issues that widely and routinely affect WISPs’ ability to provide broadband service at acceptable levels.¹⁰ In this regard, the *Service Obligations PN* could significantly address the accuracy of the NBM for the Commission’s distinct purpose of identifying unsubsidized competitors.¹¹ The Bureau proposes instead that a WISP be required to make an affirmative showing that it meets the necessary speed, latency, capacity, and price criteria.¹²

⁸ *See, e.g.*, Comments of the National Telecommunications Cooperative Association, the National Exchange Carrier Association and the Western Telecommunications Alliance, WC Docket No. 10-90, at 4-8 (filed Feb. 19, 2013) (“NTCA, *et al.* Comments”); Comments of the United States Telecom Association and the Independent Telephone and Telecommunications Alliance, WC Docket No. 10-90, at 15-16 (filed Jan. 28, 2013) (“USTelecom/ITTA Comments”).

⁹ *See* CenturyLink Petition for Waiver, WC Docket Nos. 10-90, *et al.*, at 5-11 (filed June 26, 2012).

¹⁰ WISPs often experience (1) service degradation due to third party interference from devices such as cordless phones and garage door openers; (2) difficulties in maintaining sustained speeds at the 4 Mbps/1 Mbps level required of CAF recipients; (3) lack of capacity to support significant increases in traffic; (4) and line-of-sight requirements that prevent customers from obtaining broadband service. *See* USTelecom/ITTA Comments at 16.

¹¹ *Service Obligations PN* at ¶ 11.

¹² *Id.*

Similar problems apply to some census blocks that are excluded based on the purported presence of a cable company. As has been pointed out, Comcast itself has indicated that its coverage is misstated in over 100,000 census blocks.¹³ Further, Time Warner Cable has stated that it treats entire census blocks as served if it has at least one active billing customer, or at least one former customer located in that census block if service could be reinstated within 7 to 10 days.¹⁴ While these may be sufficient representations for many uses of the NBM, they should not be deemed sufficient to prevent the residents of those census blocks from receiving the benefits of the CAF Phase II program.

NTCA's comments highlight another shortcoming of the Map. The Map does not show the availability of voice services which are the only services the CAF program supports.¹⁵ In this regard, the Bureau should build on the proposal in the *Service Obligations PN* and require providers seeking to be deemed unsubsidized competitors to prove that they offer voice services in the relevant census blocks. In short, at most, the Map may serve as an indicator of the locations that a competitor *might* serve and any reliance on the NBM to definitively identify unserved areas for CAF funding is unjustified and should not be permitted.

B. A 3 Mbps/768 kbps Proxy Should Not Be Adopted.

The Bureau's proposed challenge process would designate an area as unserved if it is shown on the NBM as unserved by broadband with a speed of at least 3 Mbps downstream and 768 kbps upstream.¹⁶ The Commission proposed the same proxy for the Phase I Incremental Support program and there maintained that 3 Mbps downstream and 768 kbps upstream is an appropriate proxy since it is "the best data currently available on the National Broadband Map for determining whether an area is served by 4 Mbps/1 Mbps" and is consistent with the approach in the *USF/ICC Transformation*

¹³ NTCA, *et al.* Comments at 6.

¹⁴ Letter from Mary McManus, Comcast, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, at 2 (filed Jan. 24, 2013).

¹⁵ NTCA, *et al.* Comments at 7.

¹⁶ *Public Notice* at ¶ 12.

Order.¹⁷ ITTA agrees with commenters in this proceeding that the 3 Mbps/768 kbps standard should be rejected.¹⁸ As discussed in the *Service Obligations PN*, the Bureau should instead look to the 6 Mbps downstream and 1.5 Mbps upstream categories.

Use of the 3 Mbps/768 kbps proxy would potentially exclude from support many areas that currently are served with less than 4 Mbps/1 Mbps broadband service. It is estimated that in excess of one million housing units classified on the NBM as served by incumbent local exchange carrier (“ILEC”) broadband at 3 Mbps downstream and 768 kbps upstream are not served by 4 Mbps downstream and 1 Mbps upstream.¹⁹ This is particularly true in rural areas served by ILECs’ DSL offerings. Rural area DSL has in most cases been engineered to provide an upstream speed of 768 kbps and would require costly upgrades to meet the 4 Mbps/1 Mbps standard.²⁰ Moreover, use of the 3 Mbps/768 kbps proxy would exacerbate the problems created by the NBM’s overstatement of broadband service by WISPs and other unsubsidized competitors.

The significant shortcomings of a 3 Mbps/768 kbps proxy dictate the adoption of a higher proxy should the Commission decide to adopt the challenge process specified in the *Public Notice* (which it should not). ITTA agrees with USTelecom that the Commission should use the next speed tier reflected on the NBM – 6 Mbps downstream /1.5 Mbps upstream – as a proxy. The use of a 6 Mbps/1.5 Mbps proxy, along with a carrier certification process,²¹ would ensure that any areas excluded from the CAF Incremental Support program are in fact being served by 4 Mbps/1 Mbps broadband.

¹⁷ *FNPRM* at n. 17.

¹⁸ See USTelecom Comments at 10; NTCA, *et al.* Comments at 5.

¹⁹ See Comments of the United States Telecom Association, WC Docket No. 10-90, at 2 (filed Jan. 9, 2013).

²⁰ *Id.* at 4-5.

²¹ The process would require price cap carriers to certify that CAF support would not be used for locations that are not currently engineered for 4 Mbps/1 Mbps service.

C. Technical Standards Should be Established Prior to Any Challenge Process.

As the *Service Obligations PN* appears to acknowledge, broadband speed, latency, usage and voice capability standards have to be established before the eligible census blocks can be identified. As USTelecom has stated, “discrete standards for speed, latency, capacity and voice capability, need[] to be set prior to the initiation of the eligibility determination process”²² since it is impossible to assess whether an unsubsidized competitor exists in the absence of such standards.

III. THE COMMISSION SHOULD ADOPT A STRAIGHTFORWARD PROCESS FOR DETERMINING ELIGIBLE CENSUS BLOCKS

In lieu of the process identified in the *Public Notice*, ITTA urges adoption of a simple and balanced approach to identifying eligible census blocks that would call for broadband providers to make an affirmative showing that they are “unsubsidized competitors.” Like NTCA, ITTA maintains that the burden should be on the broadband provider to make the necessary showing that it should appropriately be considered an unsubsidized competitor.²³ To do otherwise would put ITTA members and other current support recipients in the nearly impossible position of having to prove a negative (*i.e.*, the absence of competition). In this regard, the discussion in the *Service Obligations PN* suggests helpful improvements.

Once the Commission finalizes the service requirements applicable to CAF Phase II support recipients and used to identify unsubsidized competitors, any broadband provider that believes it meets those criteria would be free to file a petition (with the Commission or the appropriate state commission) requesting designation as an unsubsidized competitor. The petition must be accompanied by clear and convincing evidence that the broadband provider can deliver voice telephony and broadband service at speeds of at least 4 Mbps downstream/1 Mbps upstream with latency and usage limits that meet the Commission’s performance requirements for 100 percent of

²² USTelecom Comments at 9.

²³ *See* NTCA, *et al.* Comments at 9.

both residential and business locations in the purportedly competitive census blocks.²⁴ The broadband provider also must show that it does not receive high-cost support of any kind, including through stimulus program funding, and that it does not cross-subsidize its operations in the purportedly competitive area with revenues from other areas of operation or sources.²⁵ The broadband provider should be required to serve its petition on the USF support recipient serving the area in which the broadband provider requests unsubsidized competitor status.

Once such a petition has been filed and served, the USF support recipient whose support would be affected by a finding that the broadband provider is an unsubsidized competitor would be given the opportunity to rebut the broadband provider's showing. It is essential that all of the evidence submitted by the broadband provider to support its designation as an unsubsidized competitor be made available to the support recipient and other interested parties as part of the review process. It would be both unfair and inefficient (especially given the expedited timeframes that would apply) to require interested parties to independently obtain the data necessary to evaluate the broadband provider's claims.

Interested parties should be afforded 45 days to review the broadband provider's claims and supporting evidence. Responses should be required to be served on the broadband provider who would have 15 days to submit any additional information it deems appropriate. The reviewing agency would then be required to render its decision on the petition within 30 days.

In the event that both the petitioning broadband provider and the opponent(s) provide credible evidence regarding the competitive status of the area at issue, the NBM should not be used as the default determination. As USTelecom has accurately and succinctly stated, "merely because the initial determination as to the status of the census block is reflected in the NBM does not add any

²⁴ ITTA agrees with various commenters who support the tentative conclusion in the *Public Notice* (¶ 21) that partially-served census blocks should be treated as served and not eligible for CAF Phase II funding. *See, e.g.*, Comments of the American Cable Association, WC Docket No. 10-90, at 9 (filed Feb. 19, 2013); Comments of the National Cable & Telecommunications Association, WC Docket No. 10-90, at 3 (filed Feb. 19, 2013).

²⁵ NTCA, *et al.* Comments at 10.

weight or credibility to that determination.”²⁶ In the event of conflicting credible evidence, the state commission is in the best position to weigh the relative merits of the data and make a fair and informed determination.

IV. THE STATEWIDE ELECTION PROCESS MUST BE REASONABLE

Once the final list of eligible census blocks and accompanying support amounts has been established, price cap carriers will be required to elect whether to accept support in return for a statewide service commitment.²⁷ The *Public Notice* seeks comment on the appropriate time period for carriers to make such elections.²⁸ ITTA agrees with USTelecom that the applicable time period should be no less than 120 days.²⁹ The election decision will be complex, especially for carriers that operate in numerous states, and 120 days represents a reasonable balance between the need for the Commission to move forward expeditiously and the time carriers need to make fully-informed business decisions.

The *Public Notice* also asks for comment on what information carriers should be required to submit with their statewide election acceptances, including whether carriers should be required to provide geocoded latitude and longitude information and/or their preliminary plans showing the census blocks and/or wire centers, and associated locations, where they anticipate meeting the third year 85 percent build-out requirement.³⁰ With respect to latitude and longitude information, ITTA maintains that there is no identifiable need for this detailed level of data at any point in the Phase II support program since Phase II support is not location dependent. The Commission’s rules only require that a CAF Phase II support recipient serve the specified percentage of locations with broadband service that meets the appropriate service parameters – the specific locations served are at

²⁶ USTelecom Comments at 8.

²⁷ *Public Notice* at ¶ 23.

²⁸ *Id.*

²⁹ USTelecom Comments at 12.

³⁰ *Public Notice* at ¶ 25.

the support recipient's discretion. For the same reason, carriers should not have to submit their preliminary plans showing the census blocks and/or wire centers, and associated locations, where they anticipate meeting the third year 85 percent build-out requirement. As USTelecom points out, carriers also should not have to file their preliminary plans at the time they make their statewide election since to be required to do so would "detract from the necessary analysis needed for that important election. Without sufficient time and the ability to fully focus on the election decision, carriers may find it easier to choose the default position of not applying for Phase II support."³¹

V. CONCLUSION

For all of the foregoing reasons, the Commission should expeditiously adopt the modifications to the CAF Phase II program discussed herein.

Respectfully submitted,

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³¹ USTelecom Comments at 13-14.